CHAPTER 9

PA and the Rule of Law

Introduction

In the last chapter in this part of the book, I will examine the rule of law qualities of PA. One could argue that this is not necessary, since a discussion concerning the rule of law qualities of PA would most likely imply an, at least partial, overlap with the discussions conducted in the previous chapters. Thus, one could assume that the discussion to be undertaken would not really make a significant contribution to the main aim of this book, namely to reveal what the function of PA in European law is. Furthermore, one could argue that any discussion concerning the idea of the “rule of law” is increasingly becoming an empty ritual and should therefore be avoided. For one could argue that the idea in its powerful legitimating capacity has long since become another one of those concepts which everybody wants to talk about, refer to and identify themselves with, but which, in the process of becoming a conceptual fetish, has been drained of any meaningful substance.¹

However, although the rule of law is an essentially contested concept, it is nevertheless a concept which one has to relate to when writing about the institution of law – and PA as a legal phenomenon. An elaboration of the rule of law, I believe, will improve the understanding of the function of PA in European law.

The rule of law has Anglo-Saxon origins and it could be argued that it must be understood in the context of the particular dichotomy between common law and the sovereignty of Parliament which characterizes the UK legal system. An identical notion does not exist in European continental legal traditions. On the European continent, however, a similar concept exists, namely what is referred to as the German “Rechtstaat” or the French “Etat de droit.”² Since PA is a continental European legal phenomenon, rather than an Anglo-Saxon one, one could assume that PA is somehow more closely connected to the continental than the Anglo-Saxon version of the rule of law.

¹ Other examples of the same phenomenon are “democracy” as in Deutsche Demokratische Republik or “constitution” as in the EU constitution, UN constitution, WTO constitution, or human rights, etc.
² Norwegian “Rettsstat,” Italian “Stato di diritto,” Spanish “Estat de derecho,” and so on.
In what follows, I will firstly discuss the different concepts of rule of law. Secondly, I will discuss the European continental versions of the “rule of law,” and attempt to compare them to the Anglo-Saxon concept. Thereafter, I will discuss the particular challenges connected to the establishment of the rule of law in an international or supranational context. Finally, I will discuss the connection between PA and the different conceptions and versions of the rule of law, including the claim that PA is the ultimate rule of law.

1 Rule of Law as an Essentially Contested Concept

As noted in the introduction, “rule of law” is an essentially contested concept, meaning that it can be interpreted in a number of different ways, notably and categorically, but not exhaustively: formalistic/procedural or substantial. An example of a formalistic or procedural understanding of the rule of law was formulated by Friedrich von Hayek: “[s]tripped of all technicalities [rule of law] means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affair on the basis of this knowledge.”

In this minimalist definition of the rule of law, the main idea is clearly legal predictability and legal certainty, but also binding the government’s action to law, securing rule by law and the principle of legality. The rule of law is in this respect about creating stable legal frames according to which citizens can go about their private business without (frequent, extensive and not least arbitrary) interference from the government. Hayek’s minimalist version of the rule of law does not as such limit the legislative power of the state. This means that the proposed version of the rule of law does not necessarily protect citizens from a relative active legislator. After all, someone has to make the rule in the first place.

Hayek has in another book, The Political Idea of the Rule of Law, attempted to deal with this fallacy of his minimalist version of the rule of law. Thus, this time around he suggests that legal systems adhering to the rule of law have

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5 If the Hartian secondary rules were to count as rules in this regard one could argue that the legislator is also bound by rules when it legislates, typically the rule of recognition, etc., as elaborated on in the last chapter.